No. 31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH LOUISE GRIGGS, as Executrix of the Estate of Dudley R. Griggs, Deceased, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

JAMES S. HENDERSON,
209 Equitable Building,
Denver, Colo.
Counsel for Respondent.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

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OPINIONS BELOW

The order of the district court (R.5) is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (R.6-9) is reported at 178 F (2d) 1.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1949 (R.9). A petition for rehearing was

denied on January 9, 1950 (R.26-27). The petition for a writ of certiorari was filed on March 16, 1950, and was granted on May 8, (R.29). The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254 (1).

STATUTE INVOLVED

The statute involved is the Federal Tort Claims Act as it existed prior to the codification of Title 28 on June 25, 1948. The facts forming the basis of the claim asserted occurred and the action was commenced prior to the change in the provisions. The pertinent provisions as originally enacted are set forth in Appendix A *infra* pp. 28-30. The Respondent agrees with the Government that the amendment made no essential change, and that the rights of litigants in pending suits are as they existed under the former law.

QUESTION PRESENTED

In *Brooks v. the United States*, 337 U.S. 49, this Court held that the Government is liable under the Federal Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted upon him by other military personnel. The question presented here is:

> Is a member of the armed forces on hospital status in an army hospital in Illinois, as distinguished from military duty, under the protection of the Federal Tort Claims Act so that his Executrix may recover damages for his death caused by the negligence of hospital personnel, then being employees of the United States, acting within the scope of their employment?

In the *Brooks* case this Court answered in the affirmative the question as to whether members of the armed forces can recover under the Federal Tort Claims Act for injuries not incident to their service, but reserved the

question as to whether they can recover for injuries which were incident to their service. The questions presented in this case, therefore, are as follows:

(1). Was Decedent's death incident to his service?

(2). If his death was incident to his service, is his Executrix entitled to recover under the Federal Tort Claims Act, the applicable law of the state providing for survival of a tort action in favor of the personal representative for the benefit of the next of kin?

CONCISE STATEMENT OF THE CASE

The facts as stated on pages 2 and 3 of the Government's brief are correct. They omit the allegation in the complaint that the death of Lt. Colonel Griggs resulted from the negligence of the Defendant and its agents acting within the scope of their employment under circumstances where a private person would have been liable for such death in accordance with the law of Illinois, in which state the acts and omissions constituting the acts of negligence occurred, and that the death occurred in Missouri (R.3). The complaint also alleges that the appellant is the widow and executrix of Lt. Colonel Griggs, and that she and a son are the only heirs; that Lt. Colonel Griggs was a resident of Colorado at the time of his death; that Petitioner is also a resident of such state. (R. 2, 4)

The complaint further sets forth the Statute of Illinois which confers a right of action for negligence resulting in death upon the personal representatives of Decedent for the benefit of the next of kin, to be distributed as the personal property of one dying intestate, and which also states that the Law of Illinois, as interpreted by its courts, provides this right of action where the wrongful neglect or

default occurred in Illinois, although death occurred elsewhere. (R. 3, 4)

The above facts are necessary to establish the claim upon which relief should be granted, but the Government does not raise any question concerning the right of the Petitioner to bring this action, nor does the Government claim that the rights conferred by the Illinois statute and decisions are otherwise than as stated in the complaint. The discussion in this brief will therefore be directed only to a discussion of the matters raised by the Government.

SUMMARY OF ARGUMENT

The same fundamental issue is presented in *Feres v. United States* (No. 9 this term) and *Jefferson v. United States* (No. 29 this term). Briefs by the claimants in such cases have been filed and much of the argument therein contained is applicable here. The *Feres* case involves an action brought by the personal representative of the Decedent, whereas the claimant in the *Jefferson* case himself suffered the injuries which did not result in his death, but which injuries were the result of negligent acts of hospital personnel, employees of the United States, in an army hospital, acting within the scope of their employment while the member of the armed forces was not engaged in performing military duties. The circumstances of the negligence in this case are similar to those in the *Jefferson* case. Death resulted in this case, as it did in the *Feres* case.

The argument will show that:

I. The decedent's death was not incident to his service. It was caused by negligence occurring in a hospital under the control of the army, and at such time decedent was not engaged in any inherently dangerous activity.

II. Even if decedent's death had been incident to his service, his executrix is entitled to recover under the Fed

eral Tort Claims Act, the applicable law of the state providing for survival of a tort action in favor of the personal representative for the benefit of the next of kin. Discussion on this point will be directed to

A. Affirmative argument in support of petitioner's claim, under which will be considered

1. The language of the Federal Tort Claims Act makes its provisions applicable to the facts of this case.

2. The history of the bill through Congress shows that it was the intent of Congress that the provisions of the Federal Tort Claims Act should apply to the facts of this case.

3. The rule of the *Brooks* decision applies to the facts of this case.

4. The rules of statutory interpretation indicate that the Federal Tort Claims Act is applicable to the facts of this case.

5. The Illinois statute and decisions provide for a remedy in favor of the personal representative for the benefit of the next of kin of a decedent whose death results from negligence.

B. Answer to the Government's Argument, under which will be considered

1. Even though decedent's death may have been incident to his service, his executrix is nevertheless entitled to recover under the Federal Tort Claims Act.

2. The Federal Tort Claims Act was intended by Congress to apply to claims by service men for injuries or death incident to their service.

3. Neither the language nor the statutory scheme of the Federal Tort Claims Act precludes recovery of damages resulting from a service-incident injury negligently inflicted

upon one member of the armed forces by another member of the armed forces.

4. The matter of the reduction of the petitioner's claim on account of any other benefits or payments is not now before this court.

ARGUMENT

DECEDENT'S DEATH WAS NOT INCIDENT TO HIS SERVICE.

The member of the armed forces in the *Jefferson* case (No. 29 this term) and in the instant case were each undergoing treatment in an army hospital. In each case the negligence of personnel in the hospital under the control of the United States acting within the scope of their employment proximately resulted in injury in the *Jefferson* case, and death in the instant case. In neither case was the member of the armed forces required to perform any duty involving an unusual hazard. In neither case were they involved in carrying out any activities of an inherently dangerous nature. The ailments for which they were undergoing treatment had no relation to the carrying out of any military duty, combatant or otherwise, which resulted in the condition necessitating the treatment.*

The brief in the *Jefferson* case, (pp. 4-7) points out that a member of the armed forces may be required to undergo hospital treatment for the purpose of maintaining his military fitness, but that the same argument could have been advanced in *Brooks v. United States*, 337 U.S. 49 on the ground that the military personnel were on furlough for

*The complaint in the instant case does not state the nature of the malady from which the Decedent was suffering, but it is not alleged nor does the Government claim that it resulted from combatant activities or from obedience to any orders given by a superior officer involving any inherent danger.

the purpose of rest and rehabilitation designed to better fit them for military service. *It further points out that the* risks and dangers ordinarily incident to military service do not include injuries resulting from negligence of medical personnel in the treatment of an ailment connected with such service. The argument thus found on pages 4-7 of the petitioner's brief in the *Jefferson* case (No. 29 this term) is applicable here. For the sake of brevity, it is not repeated but is inserted as Appendix B (pp. 31-33).

EVEN IF DECEDENT'S DEATH WAS INCIDENT TO HIS SERVICE, HIS EXECUTRIX IS ENTITLED TO RECOVER UNDER THE FEDERAL TORT CLAIMS ACT, THE APPLICABLE LAW OF THE STATE PROVIDING FOR SURVIVAL OF A TORT ACTION IN FAVOR OF THE PERSONAL REPRESENTATIVE FOR THE BENEFIT OF THE NEXT OF KIN.

AFFIRMATIVE ARGUMENT IN SUPPORT OF PETITIONER'S CLAIM

THE LANGUAGE OF THE FEDERAL TORT CLAIMS ACT MAKES ITS PROVISIONS APPLICABLE TO THE FACTS OF THIS CASE.

The revision of the judicial code has changed some of the language and the arrangement but not the substance of the Federal Tort Claims Act.

Since Lt. Colonel Griggs' death occurred on December 18, 1947 (R.3), and since this action was commenced on May 27, 1948 (R.2), the language of the Act as originally written constitutes the governing law. The material portions of this act appear in Appendix A (pp. 28-30).

The act makes the United States liable "to the same claimants" under the same circumstances as a private person would be liable for personal injury or death caused by a wrongful act or omission of any employee of the government while acting within the scope of his office or employ-

mined in accordance with the law of the place where the act or omission occurred. The act contained some exceptions one of which was relied upon by the Government in the Court of Appeals, but has not been urged here, and will, therefore, not be discussed. Two of these exceptions, however, should be noted. 28 U.S.C. Sec. 943 (now 2680) contains the following exceptions:

> (j) claims "arising out of combatant activities of the military and naval forces and coast guard during time of war."
>
> (k) claims "arising in a foreign country."

THE HISTORY OF THIS BILL THROUGH CONGRESS SHOWS THAT IT WAS THE INTENT OF CONGRESS THAT ITS TERMS SHOULD APPLY TO THE FACTS OF THIS CASE.

The intent of Congress clearly appears from the circumstance that the original draft of the above exceptions excluded claims "arising out of activities of the military or naval forces or of the coast guard during time of war", and "arising in foreign countries". The word "combatant" was inserted before the word "activities" by amendment on the floor of the House (92 Congressional Record 10143). Congress thus has definitely been shown to have considered the dire consequences predicted by the Government should members of the armed forces be covered by the act, by excluding a large class of cases where voluminous claims involving heavy damages might be asserted, but by the same act it nevertheless included expressly and deliberately, a large class of cases within which the instant case comes. Had Congress not deemed this exclusion sufficient it would not have expressly and deliberately limited the exclusion, but would have enlarged the exclusion by rejecting the amendment which inserted the word "combatant", or it would have made a broader exclusion. Had it intended to do what the government said it intended, it could readily have devised and written into the act a specific exclusion of [illegible]

bers of the armed forces suffering from torts committed while they were on active duty.

The Bill H.R. 181 which embodies the Tort Claims Act was introduced in the 79th Congress with all of the twelve exceptions which were finally enacted in substantially the form in which they were introduced, except in respect to the word "combatant" as hereinbefore stated. There was also a thirteenth exception which excluded from the coverage of the act

> "any claim for which compensation is provided by the World War Veterans Act of 1924 as amended".

This exception was rejected by Congress.

The deliberate insertion of the word "combatant" and the deliberate rejection of this proposed exception demonstrate that Congress did not intend to exclude members of the armed forces suffering injuries or death in the United States, and not in combat, regardless of any other rights which might have been conferred under the World War Veterans' Act of 1924 as amended. (38 U.S.C. Ch. 10)

THE RULE OF THE BROOKS DECISION APPLIES TO THE FACTS OF THIS CASE.

This Court in *Brooks v. United States*, 337 U.S. 49, 51 said:

> "The statutes terms are clear. They provide for district court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of service men'. The statute contains twelve exceptions. None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of the combatant activities of the military or naval forces or Coast Guard during time of war. These and other exceptions are too lengthy, specific, and close to the present

problem to take away petitioner's judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim'. It would be absurd to believe that Congress did not have the service men in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain."

"More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was introduced the exception concerning service men had been dropped. * * * When H.R. 181 (embodying the Tort Claims Act of 1946) was included in the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared."

One proposition is clear from the *Brooks* case. This Court held that Congress did not intend to exclude all members of the armed forces from the benefits of the act. Even the reversed majority opinion of the Court of Appeals for the 4th Circuit in *United States v. Brooks*, 169 F. (2d) 840, 845, logically concedes that either all members of the armed forces are included or all are excluded. Such language is as follows:

"And the Federal Tort Claims Act, as we interpret it, either excludes (subject of course to the express exceptions) soldiers altogether or completely includes them. We are quite unable to find in the act anything which would justify us in holding that Congress intended to include death or injury to a soldier which was not service caused (the *Brooks* case), and

to exclude service caused injury or death (the *Jefferson* case)."

This Court having held, therefore, that some members of the armed forces are included within the terms of the act, the logic of the above concession that it applies to either all or none renders it inevitable that all members of the armed forces are included.

By virtue of the *Brooks* decision the Government cannot successfully contend that all members of the armed forces are excluded from the coverage of the act.

Had Congress intended to exclude some members of the armed forces it would have merely amended the proposed exception instead of deliberately striking it out *in toto*.

THE RULES OF STATUTORY INTERPRETATION INDICATE THAT THE FEDERAL TORT CLAIMS ACT IS APPLICABLE TO THE FACTS OF THIS CASE.

In *Osaka v. United States*, 300 U.S. 98, 101, this Court said:

> "(This) is not to construe the statute but to add an additional and qualifying term to its provision. This we are not at liberty to do under the guise of construction, because, as this Court has so often held, where the words are plain, there is no room for construction."

So here Congress having undertaken the insertion of certain specific exclusions, it is not to be presumed that it overlooked an important further exclusion, but rather that it named all of the exclusions that it intended, and this Court as in the *Osaka* case, is not at liberty under the guise of construction to add to its provisions.

In *Equitable Life Assurance Soc. v. Pettus*, 140 U. S. 226, 233, this Court said:

> "This construction is put beyond doubt by sec-

> 5986, which, by specifying four cases in which the three preceding sections 'shall not be applicable' necessarily implied that those sections shall control all cases not so specified."

The specific exclusions therefore carry the implication that all claims thus not excluded may be successfully asserted.

Another statement of such rule arose in an action where the defense attempted to limit the right to recover against the sovereign to uncontroverted liabilities. Mr. Justice Cardozo, while sitting on the New York Court of Appeals, said in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147; 153 N.E. 28, 29:

> "The exemption of the sovereign from suit involves hardship enough when consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The Government in effect says that Congress, having made detailed exclusions from the coverage of the act, nevertheless, really intended another important exclusion but forgot or overlooked writing it in; that Congress, although it considered an exclusion which would have eliminated substantially all members of the armed forces from the coverage of the act, nevertheless rejected such exclusion, but nevertheless intended to exclude an important class of such members, but forgot or overlooked doing so; that Congress, while still considering the bill, and foreseeing certain dire consequences, if all torts arising from combatant activities during time of war be included, therefore excluded such torts, but intended to exclude more, or rather intended to exclude a certain class of claimants, being members of the armed forces whether or not engaged in such combatant activities, but that Congress likewise forgot or overlooked doing this also.

The scrupulous care which Congress exercised by inserting the word "combatant" and rejecting the proposed thirteenth exception is a complete and conclusive refutation.

By every test the applicability of the Federal Tort Claims Act to the facts of this case is made increasingly evident.

THE ILLINOIS STATUTE AND DECISIONS PROVIDE A REMEDY IN FAVOR OF THE PERSONAL REPRESENTATIVE FOR THE BENEFIT OF THE NEXT OF KIN OF A DECEDENT WHOSE DEATH RESULTS FROM NEGLIGENCE.

Neither in the District Court nor in the Court of Appeals did the Government contend that the remedy did not exist. The Government's brief in this proceeding does not so contend. For the sake of brevity, a discussion of the Illinois statute and decisions is therefore not included here, but may be found in Appendix C (pp. 34, 35).

ANSWER TO THE GOVERNMENT'S ARGUMENT

EVEN THOUGH DECEDENT'S DEATH MAY HAVE BEEN INCIDENT TO HIS SERVICE, HIS EXECUTRIX IS NEVERTHELESS ENTITLED TO RECOVER UNDER THE FEDERAL TORT CLAIMS ACT.

The clear implication of the *Brooks* opinion is that recovery may be had under the Federal Tort Claims Act for an injury or death even though incident to the service.

The argument of the Government pages 9-19 of its brief is to the effect that the *Brooks* opinion impliedly recognized an exception in the case of an injury incident to the service because the opinion states that the cases *Dodson v. United States*, 27 F. (2d) 807 and *Bradey v. United States*, 151 F. (2d) 742, deny to members of the armed forces rights of action for injuries sustained under the Public Vessels Act, (46 U. S. C. Ch. 22). In both of these cases the injuries were sustained by naval personnel in line of duty. The Court in the *Dodson* case said:

"We believe that Congress meant to leave upon

> the members of the naval forces the same risks of injuries suffered in the service as they had before."

The *Bradley* case quoted the *Dodson* case with approval and both cases were available to Congress when the Federal Tort Claims Act was enacted in 1946.

In both cases, the Court held that the member of the armed forces had no right under the Public Vessels Act (46 U. S. C. Ch. 22) because each member of the armed forces had a remedy under another act enacted for the benefit of such members of the armed forces. In line with such decisions, H. R. 181 which embodied the Federal Tort Claims Act of 1946, was introduced in the 79th Congress with an exception for exclusion from the coverage of the act of

> "any claim for which compensation is provided by the World War Veterans Act of 1924 as amended."

This exception was eliminated by Congress. It deliberately rejected a provision in the Federal Tort Claims Act which would have carried into such act the principle established by the *Dodson* and *Bradley* cases. It thereby repudiated and made inapplicable to the Federal Tort Claims Act the doctrine of the *Dodson* case affirmed in the *Bradley* case that members of the armed forces should continue to bear the same risks of injury in the service of the United States as they had before.

In other words, it intended that members of the armed forces sustaining injuries incident to their service should not be relegated to the same remedies that they had before, but should have such additional rights as the terms of the Federal Tort Claims Act might confer upon them.

In the *Brooks* case this Court was not called upon to construe the intent of Congress with respect to its repudiation of the *Dodson* and *Bradley* doctrine and properly declined to do so. The intent of Congress is nevertheless clear.

The Government on p. 15 of its brief quotes from Judge

Swan's opinion in the *Dodson* case, 27 F. (2d) 808, 809, where he states that any other conclusion would involve a radical departure from the Government's long standing policy with respect to the personnel of its naval forces. By rejecting the above proposed exception, having the *Dodson* and *Bradey* cases available to it, Congress nevertheless made the departure in so far as the Federal Tort Claims Act is concerned. The effect of this departure makes the Federal Tort Claims Act apply to injuries incident to the service as well as to injuries sustained on furloagh.

The above answer applies also to the cases cited on page 17 of the Government's brief wherein members of the armed forces sustained injuries by reason of the negligence of persons operating railroads while under the control of the Director General of Railroads during or after the first World War.

The case of *Goldstein v. New York*, 281 N. Y. 396, 24 N.E. (2d) 97, is not applicable because the ground of the decision in that case was that the militiaman driving the truck was not an "employee" of the state, within the meaning of the New York Tort Claims Act (Laws of N. Y., 1920, ch. 92, Sec. 12; Laws of New York, ch. 860, sec. 8). Congress also had this case available to it when it enacted the Federal Tort Claims Act but nevertheless repudiated that rule by specifically providing in 28 U. S. C. sec. 941 (now sec. 2671)

> "employees of the Government includes * * * members of the military or naval forces of the United States."

It is therefore plain that Congress intended that any person suffering damage as the result of negligence of a member of the armed forces would not be denied relief under the doctrine of the *Goldstein* case, and again it had in mind that the injury in that case was also an injury incident to the service of the member of the militia who was killed as the result of the negligence of another member of the militia.

The United States Court of Appeals for the 10th Circuit was therefore amply justified in holding that Congress intended to give to all members of the armed forces the full rights accorded to all other claimants under the Federal Tort Claims Act.

THE FEDERAL TORT CLAIMS ACT WAS INTENDED BY CONGRESS TO APPLY TO CLAIMS BY SERVICE MEN FOR INJURIES OR DEATH INCIDENT TO THEIR SERVICE.

The Government urges that such an intention would subject the unique relationship of the United States and its soldiers to the varying laws of the different states and would cause judicial intrusion into the realm of military and naval affairs. The argument under the preceding subdivision is one reason why this contention is unsound. Further reasons are indicated by the exceptions which were included in the Federal Tort Claims Act, 28 U.S.C., sec. 943 (now sec. 2680). These exceptions are:

> (j) "Any claim arising out of the combatant activities of the military or naval forces or of the coast guard during time of war.
>
> (k) "Any claim arising in a foreign country."

As already indicated the word "combatant" had been omitted from the exception in the bill as originally introduced, but was later inserted.

By excluding any injuries occurring in a foreign country, it eliminated a large class of claims, the probability of occurrence of which it was certainly aware, which intent becomes all the more evident by reason of the fact that Congress chose to make the laws of the different states the test of liability.

The recognition of rights and liabilities under state law was not a new experience for Congress when the Federal Tort Claims Act was adopted. For a long period of time prior to 1938, the rules of procedure of the various states

had constituted the rules of civil procedure for the United States courts in actions at law. Rights of persons under the Bankruptcy Act (bankruptcy being a purely federal question) have long been and still are determined by the property laws of the different states, and rights and liabilities of taxpayers under the Federal Revenue Acts depend upon the laws affecting property rights of the different states.

If the question of what is or is not income in a matter of a taxpayer's liability to the United States may be determined by the laws of different states, there is nothing incongruous in leaving to the laws of the various states the matter of the presence or absence of a tort liability under any particular state of facts even in cases between the government and a soldier, who like a taxpayer, owes a duty to his government, particularly when Congress in unequivocal language made the state law the test of liability.

The case of *United States v. Standard Oil Co.*, 332 U.S. 301, was also available to Congress at the time when the Federal Tort Claims Act was enacted. The Court in such case held that Congress, not this Court or any other Federal Court, is the custodian of the national purse; and that Congress is the primary and most often the exclusive arbiter of Federal fiscal affairs; and that to this end, it cannot be assumed that Congress has been ignorant that liabilities have often arisen from injuries involving soldiers; that it is within the power of Congress to establish liabilities in favor of the United States as well as liabilities against the United States; that the rules of decision relative to such liabilities are for Congress and not for the courts; that if the United States is to receive an advantage, it is for Congress to assert it; and that Congress not having asserted a power which it could have asserted in favor of the United States, this Court would not so assert it.

The application of that case to the facts here is that Congress, not having asserted a rule which would have been

to the financial advantage of the United States when it could have so asserted it by an exception to the Federal Tort Claims Act, it is not within the province of this Court or of any other court to assert such advantage. Since Congress expressly rejected a provision which would have asserted a rule to the financial advantage of the United States and since it could have enlarged the class of excluded claimants had it so desired, which action would have been to the financial advantage of the United States, but did not do so, this Court should not assert such advantage.

The Government fears the impairment of military discipline. There can be no question that obedience and respect for superiors are prime requisites of every member of the armed forces, and that failure to fulfill those requirements is an offense which a court martial may punish. The Government foresees the grave possibility that superior officers will hesitate to issue orders if negligence or errors in judgment will subject the Government to liability, and that military efficiency will thereby suffer. Common experience is to the contrary.

War and preparation for war are necessarily wasteful. A commanding officer is not deterred from obtaining a military objective by contemplating the financial cost nor the waste of materials or money necessary to that end. He will properly conserve the lives of men entrusted to his care even though the cost in supplies, munitions, and other inevitable expenditures be vastly increased thereby. A conscientious army, naval, or marine officer is under a duty to guard the welfare of his men. The orders which he issues will be directed to that end, and their welfare will be considered paramount to the cost of insuring it. The Federal Tort Claims Act will not, and should not, deter an officer from issuing an order which he believes to be right.

The Government fears that disobedience and disrespect and lack of morale will be encouraged in the one whose duty

it is to obey. A soldier who faces automatic machine gun fire in combat training will not be defiant nor be deterred from obeying orders because he knows that the Federal Tort Claims Act gives him a right of action if he should be injured or killed through a fellow soldier's or officer's blunder. The dangers inherent in the situation will be far more of a deterrent than any right to recover in a civil action at law. Respect for superior officers will be given or withheld depending upon the personality, demeanor and good judgment of the officer and not by reason of the presence or absence of a remedy under the Federal Tort Claims Act. Congress having had the experience of four years of war, certainly considered these consequences and determined that the morale of the armed forces would be improved by the knowledge that so far as the law could give redress for injuries or deaths sustained as the result of negligence, the service man or his family would have such additional rights as the law conferred. The effect of the act should be to build, not to break down morale, but at any rate, the probability of these consequences was for Congress, and Congress, by its action determined adversely to the Government's contention. Whether right or wrong, this determination is decisive.

It is further urged by the Government that the provisions of the Military Claims Act (31 U. S. C., sec. 223(b)), which were supplanted by the Federal Tort Claims Act, indicate that Congress intended to exclude such claims from the latter. The exclusion by Congress from the Military Claims Act of service caused claims indicates that when Congress intended to exclude such claims it specifically so provided. The failure so to provide in the Federal Tort Claims Act indicates that Congress did not choose to exclude such claims from such act. This conclusion is fortified by the elimination of the proposed exception eliminated from the original bill, which has already been discussed. The repeal of the Military Claims Act (31 U. S. C., sec. 223(b)) by the Federal Tort Claims Act may not in itself have been sufficient, but the considerations already stated are sufficient.

The general principle that a new or substitute statute must be interpreted in the light of the statute it supplants does not justify the conclusion that a broad act such as the Federal Tort Claims Act must be interpreted in the light of a much narrower statute such as the Military Claims Act (31 U. S. C., sec. 223(b)), particularly when one of the exceptions of the latter act was not included in the former act.

There can, of course be no quarrel with the Government's contention that administrative construction is entitled to consideration. The vigor of the defense in the *Brooks* case and in the three cases now before this Court indicates the attitude of the Department of Defense, and such attitude is reflected in the regulations referred to on pages 31 and 32 of the Government's brief. However, one important element of the rule as the Government concedes (p. 32), is "that the practice must be generally unchallenged".

The vigor with which this contention of the Government has been resisted in all of these cases indicates just as conclusively that this administrative practice falls far short of being unchallenged.

Another element which was present in *United States v. American Trucking Association*, 310 U. S. 534, was that the Interstate Commerce Commission assisted in drafting the act and its views in respect to the interpretation thereof were accorded appropriate deference. The Department of Defense had no conspicuous part in drafting the Tort Claims Act which, in one form or another, had been submitted to eighteen sessions of Congress over a period of many years.

The purpose of this proceeding is to settle the difference of opinion as to whether or not this administrative ruling conforms to the intention of Congress.

NEITHER THE LANGUAGE NOR THE STATUTORY SCHEME OF THE FEDERAL TORT CLAIMS ACT PRECLUDES RECOVERY OF DAMAGES RESULTING FROM A SERVICE-INCIDENT INJURY NEGLIGENTLY INFLICTED UPON ONE MEMBER OF THE ARMED FORCES BY ANOTHER MEMBER OF THE ARMED FORCES.

The Government correctly states that the United States is liable only for the negligent acts of its employees acting within the scope of their employment, in circumstances where the United States, as a private person, would be liable, or in other words, in circumstances where the master would be liable for the negligence of the servant. It is also conceded that ordinarily this can be imputed only under circumstances where the servant would himself be liable. The Government then urges that under the common law one soldier is not liable in an action by another soldier for negligence occurring in the course of their military service.

Not all the cases cited by the Government support the theory since two of them recognize certain exceptions. But assuming that the general principle is correct, the non-liability of the soldier is based upon a personal immunity growing out of the relationship. A similar immunity has been recognized by the common law rule that a wife or child can not hold the husband or father liable in tort for personal injuries. The reason, as in the case of the soldier, was based upon a relationship, namely that of the family, which would suffer if harmony among the members should be disrupted by litigation.

The reason why an immunity exists in the case of the fellow soldier relationship is likewise based upon the danger to the military establishment if a fellow soldier should be subjected to the possibilty of litigation. But the law of master and servant has recognized that although a servant acting in the course of his employment might not be liable to his wife or child by reason of his immunity, nevertheless, the master may nevertheless be held liable. The *Restatement of the Law of Agency*, sec. 217 (2) states:

"A master or other principal is not liable for acts of a servant or other agent which the agent is privileged to do although the principal himself would not be so privileged, but he may be liable for an act as to which the agent has a personal immunity from suit."

The comment upon this section contains the following:

"Thus if a servant while acting within the scope of employment negligently injures his wife, the master is subject to liability."

Although some earlier American cases are to the contrary, the rule adopted in the *Restatement* is supported by the overwhelming weight of authority. In many later cases, the earlier rule has been expressly repudiated. The case most frequently cited in support of the rule adopted in the *Restatement* is *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 255; 164 N.E. (2d) 42. This case involved a claim asserted by a wife against her husband's employer for injuries resulting from the husband's negligence within the scope of his employment. Mr. Justice Cardozo, speaking for the court said:

"We have held that a wife may not maintain an action against a husband, nor a husband against a wife for personal injuries, whether negligent or wilful * * * There is no doubt that this was the rule at common law. * * *

"The disability of wife or husband to maintain an action against the other for injuries to the person is not a disability to maintain a like action against the other's principal or master. There are indeed decisions to the contrary by courts of other states. (Citing cases from Iowa and Michigan) We are unable to accept them."

The reason for the rule is expressed by *Brandtlas v. Wilkinson*, 281 Ky. 601, 605; 136 S.W. (2d) 1052:

> "We are unable to agree with the Michigan and Iowa courts upon the reason on which those opinions are based. It appears that those cases are based upon the doctrine of imputed negligence which is not here applicable. The question is one of immunity and whether or not the immunity of the husband is extended to the principal. The immunity of the husband is not based upon whether or not he was negligent but upon the ground of public policy of preserving of domestic peace and felicity. * * * It appears that the weight of authority is to the effect that the marital immunity of a spouse does not mean that there is no right of action, but merely denies the remedy as against the spouse, and does not destroy the right of action against the master."

In *Chase v. New Haven, etc. Corp.*, 111 Conn. 377, 382; 150 Atl. 107 the court expressly refused to follow the earlier rule, stating

> "Public policy may exempt the husband or parent from an action by the wife or child directly against him for his negligent act. There is no rule of law and no public policy which would exempt the employer."

Pittsley v. David, 298 Mass. 552, 553; 11 N.E. (2d) 461 states:

> "The first defence is that a wife cannot recover from the master of her husband for injury caused to her by her husband's wrong. * * * But though the defendant's contention finds support in decisions of a few states, we think it unsound. There is no universal legal identity of husband and wife. The policy that gives the husband immunity from action at law by the

wife (citing a Massachusetts case) does not extend "the immunity to the master."

McLaurin v. McLaurin Finance Co., 166 Miss. 180, 189; 190; 146 So. 877 quotes with approval the decision of Mr. Justice Cardozo cited above.

> "In this state, we are committed to the common law doctrine that neither the wife nor the husband could maintain an action against the other for personal tort committed by one upon the other. * * *
>
> (p. 190) * * * "In a case where the tortious act of the servant is the act of the master, the master is liable proximately even though the wife may not recover from the husband, the servant."

Koontz v. Messner, 320 Pa. 487, 492; 181 Atl. 792:

> "It must be conceded that some courts have held a wife barred against her husband's master in similar situations, (citing Iowa, Maine, Michigan, and Nebraska cases). We are convinced however that the better rule is that established in the contrary group of cases" (citing the New York case among others).

Metropolitan Life Insurance Co. v. Huff, 48 Ohio App. 412, 417; 194 N.E. 429 says:

> "We prefer the reasoning of the cases hereinbefore cited in which it is held that a wife injured by the negligence of her husband while acting for his employer, and within the scope of his employment, may maintain an action against such employer, although she is precluded from maintaining an action against her husband for such injuries."

The following cases also support the above rule:

Hensel v. Hensel etc. Co., 209 Wis. 489; 245 N.W. 159, *Mikado Cleaners v. Daniels*, 235 Ala. 469; 179 So. 908, *Miller*

v. Traholm, 196 Minn. 438; 265 N.W. 324, *Mahaffy v. Lauenberg Bros. Grain Co.*, 339 Mo. 582; 98 S.W. (2d) 645.

Accordingly even though the negligent servant being a member of the armed forces could not be held liable to another member of the armed forces for his negligent act by reason of this immunity, such immunity does not relieve the soldier's master being the Government for damages resulting from such servant's negligence in the course of the servant's employment. Such is the law in the *Restatement*, and such is the rule recognized by the weight of authority. Accordingly in this case, even though an action would not lie against the hospital personnel, it would nevertheless lie against the master which is the United States.

The Federal Tort Claims Act states that the United States is liable under conditions where a private person would be liable for negligence of the employee. The Illinois courts have recognized the liability in the case of a private hospital in *Galesburg Sanitarium v. Jacobson*, 103 Ill. App. 26, 28 and *Olander v. Johnson*, 258 Ill. App. 89, 98. The Government makes no claim that such is not the law of Illinois, but extracts from those cases are cited in Appendix D. (p. 36).

THE MATTER OF THE REDUCTION OF THE PETITIONER'S CLAIM ON ACCOUNT OF ANY OTHER BENEFITS OR PAYMENTS IS NOT NOW BEFORE THIS COURT

The facts relative to the benefits and payments referred to on pages 37 and 38 of the Government's brief were not before the trial court which considered only the complaint (R. 2-4) and the motion to dismiss (R. 4 and 5), nor were such facts before the Court of Appeals until after the Court of Appeals had rendered its decision. These facts were first referred to in the Petition for Rehearing in the Court of Appeals (R. 25-27). The Petitioner here had no chance to submit such facts nor any answer thereto or comment thereon for the reason that under the rules of the Court of Appeals no answer or reply to the Petition for Rehearing

was permitted. Nevertheless, assuming the correctness of the facts as stated in the letters made a part of the Petition for Rehearing, the widow up to Jan. 11, 1950 would have received $2,260.20, and would thereafter receive $75.00 per month so long as she should remain unmarried, and she received $2,695, the six months gratuity benefit.

The amount of the insurance should not be taken into consideration under the rule adopted by the Court of Appeals for the 4th Circuit on remand of *United States v. Brooks*, 176 F. (2d) 482, 485. It was there held that the insurance from the United States should not be considered in the computation of the judgment, any more than would insurance from any private life insurance company.

The Illinois statute Smith Hurd Ill. Ann. Stat. ch. 70, Sec. 2, provides that the recovery is for the exclusive benefit of

> "widow and next of kin in the proportion provided by law in relation to distribution of personal property left by persons dying intestate." (R. 3)

The letters attached to the Petition for Rehearing (R. 25-27) indicate the amount which only the widow is to receive. But Lt. Colonel Griggs left surviving him also a son (R. 4), who, under the intestate laws of Colorado, the residence of the deceased (R. 2), is entitled to one-half of the decedent's estate (Vol. 4 of 1935 Colo. Stat. Ann. ch. 176, sec. 1). The payments and benefits to the widow do not discharge the liability to the son who is one of the next of kin for whose benefit the Illinois statute provides a remedy.

Neither the District Court nor the Court of Appeals passed upon the amount of damages. Such issue is not before this Court, and the amount, if any, of any deduction for benefits or payments received by the widow are matters for determination in the first instance by the District Court if this Court shall affirm the judgment of the Court of Appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the United States Court of Appeals for the 10th Circuit should be affirmed.

JAMES S. HENDERSON,
209 Equitable Building,
Denver, Colorado,
Counsel for Respondent.

APPENDIX A

Federal Tort Claims Act

28 U.S.C. Sec. 941 (Now Sec. 2671)

As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: Provided, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. Sec. 931(a) (Now Secs. 1346(b) and 2674)

Subject to the provisions of this title, the United States District Court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States District Courts for the territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,

under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

28 U.S.C. Sec. 943 (Now Sec. 2680)

The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., Title 46, Secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., Title 46, Secs. 781-790 inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

APPENDIX B

Portion of Petitioner's Brief in Jefferson Case

Petitioner urges that his injury was not "incident to his service", in the ordinary connotation of the phrase, and hence maintains that he should be entitled to recover under the *Brooks* decision.

Petitioner's injury was not an injury incurred in the performance of petitioner's normal and usual military duties, incurred as it was while he was a patient in an Army hospital receiving treatment for cholecystitis (R. 17), an organic ailment wholly unconnected with his service in the armed forces. It might be contended that petitioner was required to undergo the hospital treatment for the purpose of maintaining his military fitness but, by analogy, the same argument might have been advanced in the *Brooks* case, *i.e.*, that the military personnel there were on furlough for the purpose of rest and rehabilitation designed to better suit them for military service. The risks and dangers ordinarily incident to military service do not include injuries resulting from the negligence of an Army surgeon in the treatment of an ailment unconnected with such service. Petitioner's injuries were incident to his service only "in the sense that all human events depend upon what has already transpired", as Mr. Justice Murphy expressed it in the opinion in the *Brooks* case. The word "incident" means apt to occur. *Smith v. New York Life Ins. Co.*, 86 N.E. 2nd 340, 342. La. . And it has been held that the negligence of a fellow servant is not an "incident of the employment" and the servant does not assume the risks thereof unless they are obvious and patent. *Smith v. Stuart C. Irby Co.*, 151 S. W. 2d 996, 997, 998, 202 Ark. 736. Surely petitioner's injury was not such as was *apt* or *likely* to occur in connection with his military service.

The phrase "incident to his service" has not been de-

fined by statute. The Judge Advocate General of the Army, however, has said that the phrase, as used in connection with property claims, refers to "damages, loss or destruction of property being used by the claimant in the actual performance of some official duty at the time the damage, loss or destruction occurs * * *". See "Claims By and Against the Government", Judge Advocate General's School Text No. 8, p. 39 (1944).

It is true that petitioner was on "active duty" while hospitalized, but so were the Brooks brothers on "active duty" while on furlough. See *Moore v. United States*, 48 Ct. Cl. 110, 113. The decision of the Second Circuit in *Feres v. United States*, 177 F. 2d 535, 537, erroneously regards the servicemen in the *Brooks* case as not having been on "active duty". They were.

A soldier on furlough receives army pay and allowances (see The Judge Advocate General's School Text No. 3 "Military Affairs" p. VIII-25), is subject to the Articles of War and courts-martial (see Manual For Courts-Martial, U. S. Army—1949—par. 10, pp. 10-11), and is entitled to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the Army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 USCA 701 (a)) to:

> "(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal repre-

sentative is entitled to the six months death gratuity (10 USCA 903 and 456a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on *active duty* and was injured "in line of duty." The theory is set out in *Moore v. U. S.*, 48 Ct. Cl. 110, 113, *supra*:

> "As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. * * * The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see The Judge Advocate General's School Text No. 3 "Military Affairs" (1943 ed.) pages X-26 to X-34.

It is submitted that the decision in the *Brooks* case should control here. If the injury and death of the servicemen there was compensable under the Tort Claims Act, then this petitioner should be entitled to recover, without regard to the question of whether injuries "incident to the service" are within the purview of the Act. Whether injured on furlough or in an army hospital, each is on active duty and subject to military control though not engaged in the performance of their *normal* duties, each is entitled to the same special statutory benefits and it is submitted that both should be entitled to the benefits of the Tort Claims Act.

APPENDIX C

Illinois Statutes and Decisions Relative to Survival of Actions

Smith Hurd Illinois Ann. Stat. Ch. 70 Section 1. Action for Damages.

Be it enacted by the People of the State of Illinois represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Section 2. Action By whom brought—Limit of Damages—Death outside State.

Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of $15,000; Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover dam-

ages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

Since Lt. Colonel Griggs died in Missouri, it might seem that the last proviso barred the right to recover in Illinois but the Illinois Supreme Court in *Crane v. Chicago and W. I. R. R. Co.*, 233 Ill. 259, 263; 84 N.E. 222 considered a case where decedent was injured by the negligence of defendant railroad's lessee in Cook County, Illinois, but died in a hospital in Hammond, Indiana. The court said

> "We think it obvious that the object of the legislature in passing the proviso of Section 2, above referred to, was to prevent the bringing of actions in the courts of this state to recover damages for personal injuries resulting in death where the wrongful act causing it occurred outside of the limits of this State, and not to prevent the bringing of actions to recover damages for personal injuries, where the wrongful act, neglect, or default took place in this state, although the death occurred outside of this state."

The same rule was followed in *Fortner v. Wabash R. Co.*, 162 Ill. App. 1, 3.

The Illinois court has also upheld the right of a foreign administratrix to sue for wrongful death in *Wabash, etc. R. Co. v. Shacklet*, 105 Ill. 364, 382 and such right has been held to extend to suits in the Federal Courts by *Waltz v. Chesapeake, etc. R. Co.*, 65 F. Supp. 913, 914.

APPENDIX D

Illinois Decisions on Liability of Hospitals

Galesburg Sanitarium v. Jackson, 102 Ill. App. 26, 28.

"Appellee was ill and was a patient residing at the hospital for treatment, and was paying for the services he received, and was entitled to kind treatment, so far as the nature of his malady would allow. * * * Appellant's servants on the occasion above referred to unnecessarily abused plaintiff, and inflicted upon him injuries for which the jury were warranted in holding their master responsible."

Olander v. Johnson, 258 Ill. App. 89, 98.

"A private hospital is one which is founded and maintained by a private person or corporation. Its liability for damages growing out of negligence is the same as that of natural persons."